SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1320

SAM MILLARD,

Petitioner,

versus

THE UNITED STATES OF AMERICA

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

May It Please the Court:

I

Opinions of Courts Below

The opinion of the Circuit Court of Appeals for the Fifth Circuit, dated March 29, 1945 (R. 60-64), is not yet reported.

II

Jurisdiction

The statutory provision which is believed to sustain the jurisdiction of this Court is Section 240 of the Judicial Code, as amended (28 U. S. C. A. 347).

III

Statement of the Case

This has already been stated in the preceding petition under Paragraph I thereof, which is hereby adopted and made a part of this brief.

IV

Specification of Errors

The Circuit Court of Appeals erred as follows:

1. In failing to hold that each and every count of the said information was bad for duplicity, in that more than one crime was charged in each of said counts.

2. In failing to hold that the information did not state facts or grounds sufficient to constitute against petitioner a crime against the United States.

3. In failing to hold that each and every count of the said information was vague, indefinite, and uncertain, and did not fully inform petitioner of the charges made against him; because in each count the allegations of fact necessary to constitute a crime were insufficient, uncertain, and ambiguous; and because each count was not sufficient in form or substance to plead the judgment in bar of another prosecution for the same offense.

4. In failing to hold that petitioner should have been allowed to withdraw his plea of not guilty immediately before the trial for the purpose of permitting the filing of a motion for a bill of particulars, a demurrer and a motion to quash the amended bill of information.

5. In failing to pass on petitioner's motion in arrest of judgment, in which the constitutionality of the Second War

Powers Act of 1942 and the Emergency Price Control Act of 1942 was attacked.

6. In failing to express an opinion as to whether petitioner could be confined in a penitentiary, inasmuch as he was sentenced for violations of a misdemeanor.

V

Argument

A more concise or better argument as to *specification of errors 1, 2, and 3* than was advanced to the Circuit Court of Appeals cannot be urged and it is therefore restated herein.

Duplicity is the joining in one count of two or more distinct offenses. The first count in paragraphs 1 and 2 sets out the various statutes violated. In all of the other counts the allegations contained in paragraphs 1 and 2 of Count 1 were incorporated, in the following language:

> "That all the allegations contained in paragraphs 1 and 2 of Count 1 of this information are, and at the times herein alleged, were true, and said Count 1 as to said allegations is hereby referred to and made a part hereof as if set out at length herein:"

The following identical language is used in all of the counts:

> "* * *, one Sam Millard, whose full name is otherwise unknown to your information, hereinafter called 'defendant', being then and there a retail dealer in automobile and truck tires and tubes, operating an establishment at which automobile and truck tires and tubes were sold to consumers in the regular course of business, did knowingly, wilfully and unlawfully *sell, transfer, and deliver* to * * *"

Counts 1 to 11 then follow with:

"without having demanded and received of the said * * * in exchange for said tire a certificate issued by the local, etc.,"

Counts 12 to 19 then follow with:

"at a price in excess of and higher than the maximum price fixed and established by Revised Price Schedule No. 63, etc.,"

Counts 1 to 11 end with the following language:

"* * * against the peace and dignity of the United States and contrary to the form of the statute in such case made and provided, and especially Section 1315.801 of Ration Order 1-A as amended and Section 2 (a) (5) of the Priorities and Allocations Act, as amended by the Second War Powers Act."

Section 1315.801 of Ration Order 1-A reads:

"Notwithstanding the terms of any contract, agreement or other obligation, regardless of when made, no person, unless permitted by Ration Order No. 1A, or by an order, authorization or regulation issued by the War Production Board, shall:

(a) Make or offer to make, accept or offer to accept, or solicit a transfer of any tire, new tube or camelback; or

(b) Use, alter or change the physical location of any tire, new tube or camelback; or

(c) Mount any tire or new tube upon a wheel or rim."

Counts 12 to 19 end with the following language:

"* * * against the peace and dignity of the United States and contrary to the form of the statute in such case made and provided, and especially Section 4 (a) and 205 (b) of the Emergency Price Control Act of 1942, as amended, and Revised Price Schedule Number 63."

Section 1315.101 of Revised Price Schedule No. 63 reads as follows:

> "Maximum retail prices. On and after January 5, 1942, regardless of the terms of any contract of sale or other commitment, no person shall *sell, offer to sell, deliver or* transfer at retail, any new rubber tire or tube, at prices higher than the maximum prices set forth in Appendices A and B hereof, incorporated herein as 1315.110 and 1315.111."

Regulation No. 63 was revoked April 20, 1944, effective May 1, 1944.

As to Counts 17, 18 and 19, which were amended to substitute MPR 528 for Revised Price Schedule 63, we quote below the applicable language of Sec. 2 of Part 1315 of MPR 528, the effective date of which was April 20, 1933:

> "Sec. 2. Prohibition against dealing in tires and tubes, recapping and repairing at prices above the maximum. On and after the effective date of this regulation, no person shall *sell or deliver,* or recap or repair any tire or tube, and no person shall buy or receive any tire or tube or any recapping or repairing service in the course of trade or business, at a price higher than the maximum price fixed by this regulation, regardless of any contract or other obligation, * * *".

Section 4 (a) of the Emergency Price Control Act of 1942 reads in part as follows:

> "It shall be unlawful, regardless of any contract, agreement, lease or other obligation heretofore or hereafter entered into, for any person to *sell or deliver* any commodity, or in the course of trade or business to buy or receive any commodity, * * *."

From a careful comparison and analysis of the language contained in the various acts and orders quoted above, petitioner contends that two distinct offenses were joined,

namely, the transfer of tires and the sale of tires. This position is strengthened by the incorporation in each count of the allegations of Paragraphs 1 and 2 of Count 1 of said information.

The penalty under the Priorities and Allocations Act as amended by the Second War Powers Act of 1942 is $10,000.00 or one (1) year or both; a similar penalty is prescribed by Ration Order 1A. The penalty prescribed by the Emergency Price Control Act of 1942 is $5,000.00 or one (1) year or both, and it is clear that Congress is prescribing different penalties intended that the offenses be distinct. A tire can be transferred without being sold, but we doubt that a tire could be sold without being transferred. We believe this case in principle is analogous to that of *Creel* v. *United States*, (C. C. A. 8), 21 F. (2d) 690.

This Court in the case of *United States* v. *L. Cohen Grocery Company*, 255 U. S. 81, 65 L. Ed. 510, upheld the doctrine that Courts when called upon to apply criminal sanctions has the power to determine whether the indictment before it is sufficiently definite in its charges.

The information we suggest is highly conglomerated, and we believe it justifies the definition Webster has given said word, to-wit: "*That which is compacted or massed together from various sources.*"

Where is the language "sell, transfer and deliver" used in Counts 1 to 11 inclusive to be found? The answer seems to be in Section 1315.101 of the Revised Price Schedule No. 63 and in Section 4 (a) of the Emergency Price Control Act of 1942, the pertinent portions of which we have quoted above. These laws would seem to apply to the violations alleged in Counts 12 to 19 inclusive. Yet the identical language is used in all of the counts. Certainly this language is not found in Ration Order 1A, or in the Second War Powers Act of 1942.

Potter v. *U. S.*, 155 U. S. 438, 39 L. Ed. 214, 15 S. Ct. 144, is to the effect that it is sufficient and usual to follow the statutory language if it contains all that is essential to constitute the crime and apprise the defendant of the nature of the offense charged. In Counts 1 to 11 inclusive the statutory language is not even used. While we realize the complexities attendant upon a study of the maze of the acts, orders and regulations involved, as evidenced by Paragraphs 1 and 2 of Count 1, we cannot but help conclude that the pleader took the easy way out in drafting the information. In Paragraphs 1 and 2 of Count 1 he set out every conceivable law, order and regulation. He then incorporates this in every count by reference; he uses the identical language in every count, adding in Counts 1 to 11 that the *sale, transfer and delivery* was without a certificate, and in Counts 12 to 19 that the *sale, transfer and delivery* was above the maximum price.

As to Counts 12 to 19 there are a number of reasons why they do not set out facts and grounds sufficient to state an offense against the United States. Section 1315.101 of Revised Price Schedule No. 63 states "no person shall sell, offer to sell, deliver or transfer *at retail* * * *." While all of the counts state the defendant was a retail dealer, they did not allege specifically that the tires were sold at retail.

Was Revised Price Schedule No. 63 issued pursuant to an existing authority? We think not, in spite of the fact the information so states it was issued pursuant to the Emergency Price Control Act of 1942, approved January 30, 1942. Revised Price Schedule No. 63 was issued on December 21, 1941, effective January 5, 1942, which was prior to the approval of the Emergency Price Control Act.

As to specification of error No. 4. On September 27, 1944, Counts 17, 18 and 19 were amended to substitute the

words "Maximum Price Regulation Number 528", for the words "Revised Price Schedule Number 63". While an information may be amended in form or substance, the amendment makes it in effect a new information, the original one being *ipso facto* deemed abandoned and set aside. *Ex Parte Bain*, 121 U. S. 1, 30 L. Ed. 849, 7 S. Ct. 781; *Armstrong* v. *U. S.* (C. C. A. 9), 16 F. (2d) 62. Paragraphs 1 and 2 of Count 1 were not amended, and inasmuch as Counts 17, 18 and 19 incorporated these two paragraphs, it is clear that said counts did not set forth an offense.

In any event, the information was in effect a new one and your petitioner should have been given an opportunity to avail himself of the defense he originally had. Certainly if a new indictment had been returned, petitioner would have had to go through the additional process of attacking the new indictment, and the denial of this right under the amended information was a denial of a substantive right.

Specification of error No. 5. The Circuit Court of Appeals completely ignored the Specification of Error as to the overruling of the motion in arrest of judgment, in which the constitutionality of the Second War Powers Act of 1942 and the Emergency Price Control Act of 1942, was attacked (R. 40-41). We are familiar with the cases decided by this Court, namely, *Yakus* v. *United States*, 321 U. S. 417, 64 S. Ct. 660; *Bowles, Administrator*, v. *Willingham, et al.*, 321 U. S. 503, 64 S. Ct. 641. However, we can find no cases which have specifically passed upon all phases as outlined in petitioner's motion in arrest of judgment. We believe it of national importance that these specific points be decided.

Specification of error No. 6. The laws violated are misdemeanors, not felonies. However, petitioner received an aggregate of five (5) years and he should be informed as to

whether he has to serve this sentence in a penitentiary, should this writ be denied.

Conclusion

This case is therefore one calling for the exercise by this Court of its supervisory powers through the granting of a writ of certiorari, followed by a review and reversal of said decision of the Circuit Court of Appeals.

Respectfully submitted,

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